

- D. A SHPO/THPO may make available lists of other groups, including tribes and organizations of tribes, which should be provided notice for Undertakings to be located in particular areas.
- E. If the Applicant receives a comment regarding potentially affected Historic Properties, the Applicant shall consider the comment and either include it in the initial submission to the SHPO/THPO, or, if the initial submission has already been made, immediately forward the comment to the SHPO/THPO for review. An Applicant need not submit to the SHPO/THPO any comment that does not substantially relate to potentially affect Historic Properties
- F. The relevant SHPO/THPO, local government, and Indian tribes and NHOs that attach religious and cultural significance to Historic properties that may be affected are entitled to be consulting parties in the Section 106 review of an Undertaking. The Council may enter the Section 106 process for a given Undertaking, on invitation or on its own decision, according to its rules. An Applicant shall consider all written requests of other individuals and organizations to participate as consulting parties and determine which should be consulting parties. An Applicant is encouraged to grant such status to individuals or organizations with a demonstrated legal or economic interest in the Undertaking, or demonstrated expertise or standing as a representative of local or public interest in historic or cultural resources preservation. Any such individual or organization denied consulting party status may petition the Commission for review of such denial. Applicants may seek assistance from the Commission in identifying and involving consulting parties.^{10 11}
- G. Consulting parties are entitled to: (1) receive notices, copies of submission packets, correspondence and other documents provided to the SHPO/THPO in a Section 106 review; and (2) be provided an opportunity to have their views expressed and taken into account by the Applicant, the SHPO/THPO and, where appropriate, by the Commission.

¹⁰ The Conference, the Ohio SHPO, and Verizon Wireless suggest that this section be amended to specify a period for public and local government response.

¹¹ CTIA has concerns regarding consulting parties' treatment of confidential and proprietary information that may be included in an Applicant's Submission Packet. Accordingly, CTIA strongly recommends including a confidentiality clause binding upon all Parties. The Ohio SHPO believes there should not be a blanket provision for the confidentiality of "proprietary" information on the part of the carriers, since information regarding their consideration of alternative sites is invaluable to the SHPO where there are historic properties present and there is a need to look for ways to avoid or reduce effects. The Ohio SHPO states that this provision would be especially problematic for SHPOs that are subject to strong state-level FOIA requirements.

VI. IDENTIFICATION, EVALUATION, AND ASSESSMENT OF EFFECTS

In preparing the Submission Packet for the SHPO/THPO pursuant to Section VII of this Nationwide Agreement and Attachments 3 and 4, the Applicant must: (1) define the area of potential effects (APE); (2) identify Historic Properties within the APE; (3) evaluate the historic significance of identified properties; and (4) assess the effects of the Undertaking on Historic Properties. The standards described below shall be applied by the Applicant in preparing the Submission Packet, by the SHPO/THPO in reviewing the Submission Packet, and where appropriate, by the Commission in making findings.

Identification, evaluation, and assessment are most expeditiously accomplished by individuals with historic preservation and cultural resource management expertise and experience.

A. Consideration of Direct Effects and Visual Effects

The /EBCI request that the use of the law be used here, "A" above should read by legal standards: Consideration of Direct, Indirect, and Cumulative Effects

A SHPO/THPO, consistent with relevant state procedures, may specify geographic areas in which no review for direct effects on archeological resources is required or in which no review for visual effects is required.

B. Definition of the Area of Potential Effects

1 Direct Effects

The APE for direct effects is limited to the area of potential ground disturbance and the portion of any Historic Property that will be destroyed or physically altered by the Undertaking.

2 Visual Effects

a. Unless otherwise established in consultation with the SHPO/THPO, the presumed APE for visual effects for the construction of new Facilities is the area from which the tower will be visible:

- 1) Within a half mile of the proposed tower, if the proposed tower is 200 feet or less in overall height;
- 2) Within 3/4 mile of the proposed tower, if the proposed tower is more than 200 feet but no more than 400 feet in overall height;

- 3) Within 1 ½ miles of the proposed tower, if the proposed tower is more than 400 feet in overall height.¹²
- b. In the event the Applicant determines, or the SHPO/THPO recommends, that an alternative APE for visual effects is necessary, the Applicant and the SHPO/THPO may mutually agree to an alternative APE.
- c. If the parties, after using good faith efforts, cannot reach agreement on the use of an alternative APE, either the Applicant or the SHPO/THPO may submit the issue to the Commission for resolution. The Commission shall make its determination concerning an alternative APE within a reasonable period of time.

C. Identification of Historic Properties

1. The Applicant, using research techniques and employing methodology generally acceptable to the preservation profession and considering public comments, shall identify Historic Properties in the APE, including Historic Properties to which any Indian tribe or NHO attaches religious or cultural significance.
2. The level of effort and the appropriate nature and extent of identification efforts will vary depending on the location of the project, the likely nature and location of Historic Properties within the APE, and the current nature of and thoroughness of previous research, studies, or Section 106 reviews.
3. No archeological survey shall be required if the Undertaking is unlikely to cause direct effects to archeological sites. Disagreements regarding the necessity for an archeological survey may be referred to the Commission for resolution. The EBCI/THPO will not agree with this statement. Surveys are often warranted, where some sites of cultural significance will be indirectly affected; also, if no survey has been conducted how do you know the likelihood of directly affecting sites?
4. It may be assumed that no archeological resources exist within the APE where all areas to be excavated related to the proposed Facility will be located on ground that has been previously disturbed to a depth of (1) two feet or (2) six inches deeper than the general depth of the

¹² The Conference asks the following be added: "4) For proposed Facilities 1,000 feet or taller, the applicant shall, in consultation with the SHPO, determine the APE for each Facility." The National Trust concurs with this request.

anticipated disturbance (excluding footings and similar limited areas of deep excavation), whichever is greater, and where no archeological resources are recorded in files of the SHPO/THPO or any potentially affected Indian tribe or NHO. The EBCI/THPO disagrees with the depth discussed in VI.C.4 (1) two feet or (2) six inches...which is greater; the EBCI/THPO recommends that "actually sterile soils" replace this discussion of the PA.

D. Evaluation of Historic Significance

1. The Applicant shall apply the National Register criteria (36 C.F.R. Part 63) to properties identified within the APE and request SHPO/THPO concurrence as part of the review of the Submission Packet.
2. Where there is a disagreement regarding the eligibility of a resource for listing in the National Register and, after attempting in good faith to resolve the issue, the Applicant and the SHPO/THPO continue to disagree regarding eligibility, the Applicant may submit the issue to the Commission. The Commission shall handle such submissions in accordance with 36 C.F.R. § 800.4(c)(2).

E. Evaluation of Effects

1. Applicants shall evaluate effects of the Undertaking on Historic Properties using the Criteria of Adverse Effect (36 C.F.R. § 800.5(a)(1)).
2. In determining whether Historic Properties in the APE may be adversely affected by the Undertaking, the Applicant should consider factors such as the topography, vegetation, known presence of Historic Properties (including locally designated historic districts and traditional cultural properties), and existing land use.
3. An Undertaking will have a visual adverse effect on a Historic Property if the visual effect from the Facility will noticeably diminish the integrity of one or more of the characteristics qualifying the property for inclusion in or eligibility for the National Register. Construction of a Facility will not cause a visual adverse effect except where visual setting or visual elements are character-defining features of eligibility. Examples include: (1) a designed landscape which includes scenic vistas, (2) a publicly interpreted Historic Property where the setting or views are part of the interpretation, (3) a traditional cultural property

which includes qualifying natural landscape elements, or (4) a rural historic landscape.¹³

4. For collocations not excluded from review by the Collocation Agreement or this Agreement, the assessment of effects will consider only effects from the newly added or modified Facilities and not effects from the existing Tower or Antenna.

VII. PROCEDURES

A. Use of the Submission Packet

1. For each Undertaking within the scope of this Nationwide Agreement, the Applicant shall initially determine whether there are no Historic Properties affected, no adverse effect on Historic Properties, or an adverse effect on Historic Properties. The Applicant shall prepare a Submission Packet and submit it, together with the required documentation, to the SHPO/THPO and to all consulting parties, including any Indian tribe or NHO that is participating as a consulting party.¹⁴
2. The SHPO/THPO shall have 30 days from receipt of the requisite documentation to review the Submission Packet.
3. If the Applicant forwards to the SHPO/THPO a comment or objection, in accordance with Section V.F, more than 25 but less than 31 days following its initial submission, the SHPO/THPO shall have five calendar days to consider such comment or objection before the Section 106 process is complete or the matter may be submitted to the Commission.
4. If the SHPO/THPO determines the Applicant's Submission Packet is inadequate, the SHPO/THPO will immediately return it to the

¹³ PCIA suggests the following language: "...Construction of a Facility will not cause a visual adverse effect except where the Facility noticeably diminishes the visual elements of setting, feeling or association within the boundary of a Historic Property, where such elements are important elements of that historic property's eligibility. Examples include Facilities located within the actual, or, for unlisted properties, the most logical or reasonable boundary of: (1) a designed landscape which includes scenic vistas, (2) a publicly interpreted Historic Property where the setting or views are part of the interpretation, (3) a traditional cultural property which includes qualifying natural landscape elements, or (4) a rural historic landscape."

¹⁴ PCIA would add following this paragraph: "Any consulting party may, within the 30-day review period provided below, submit to the Applicant a description of its reasons for disagreement. The Applicant may consult with the party to resolve the disagreement or ask the Commission to review the finding to which objection is made."

Applicant with a description of any deficiencies. The Applicant may resubmit an amended Submission Packet to the SHPO/THPO any time within 60 days following its receipt of the returned Submission Packet.¹⁵ At its completion the new submission packet will be provided to the SHPO/THPO for a 30-day review.

B. Determinations of No Historic Properties Affected

1. If the SHPO/THPO concurs in writing with the Applicant's determination of no Historic Properties affected, it is deemed that no Historic Properties exist within the APE or the Undertaking will have no effect on any Historic Properties located within the APE. The Section 106 process is then complete, and the Applicant may proceed with the project, unless further processing for reasons other than Section 106 is required.
2. If the SHPO/THPO does not provide written notice to the Applicant that it agrees or disagrees with the Applicant's determination of no Historic Properties affected within 30 days following receipt of a complete Submission Packet, **it is deemed that no Historic Properties exist within the APE and the Undertaking will have no effect on Historic Properties. The Section 106 process is then complete** and the Applicant may proceed with the project, unless further processing for reasons other than Section 106 is required. The EBCI/THPO recommends that the highlighted section be deleted in this PA. Section 106 is not completed until construction has been completed. In addition, the Applicant may proceed with the project, until or unless further processing for reason is required (for instance, an inadvertent discovery of cultural material or human remains ...)
3. If the SHPO/THPO provides written notice within 30 days following receipt of the Submission Packet that it disagrees with the Applicant's determination of no Historic Properties affected, it should provide a short and concise explanation of exactly how the criteria of eligibility and or criteria of Adverse Effect would apply. The Applicant and the SHPO/THPO should engage in further discussions and make a reasonable and good faith effort to resolve their disagreement. The EBCI/THPO does not have to disclose any confidential information to applicant

¹⁵ CTIA and PCIA recommend language that specifically states when the 30-day period is tolled and when and if the clock restarts with respect to the 30-day review period. PCIA would eliminate the 60-day limit on resubmissions, and would provide for Commission resolution of disputes regarding the adequacy of a submission.

and or FCC in the event that confidential information to the applicant and or FCC in order to discuss the significance of effect to a property site.

4. If the SHPO/THPO and Applicant do not resolve their disagreement, the Applicant may at any time choose to submit the matter, together with all relevant documents, to the Commission, advising the SHPO/THPO accordingly.

C. Determinations of No Adverse Effect

1. If the SHPO/THPO concurs in writing with the Applicant's determination of no adverse effect, the Facility is deemed to have no adverse effect on Historic Properties. The Section 106 process is then complete and the Applicant may proceed with the project, unless further processing for reasons other than Section 106 is required. The EBCI/THPO once again recognizes the unanticipated discoveries may occur and comment is needed to secure inadvertent discoveries.
2. If the SHPO/THPO does not provide written notice to the Applicant that it agrees or disagrees with the Applicant's determination of no adverse effect within thirty days following its receipt of a complete Submission Packet, the SHPO/THPO is presumed to have concurred with the Applicant's determination. The Applicant shall, pursuant to procedures to be promulgated by the Commission, forward a copy of its Submission Packet to the Commission, together with all correspondence with the SHPO/THPO and any comments or objections received from the public, and advise the SHPO/THPO accordingly. The Section 106 process shall then be complete unless the Commission notifies the Applicant otherwise within a period of time to be specified by the Commission. The EBCI/THPO recommends that the same comment as the above comment for unanticipated discoveries may occur and comment is needed to secure inadvertent discoveries. Nothing may be presumed.
3. If the SHPO/THPO provides written notice within 30 days following receipt of the Submission Packet that it disagrees with the Applicant's determination of no adverse effect, it should provide a short and concise explanation of exactly how the criteria of Adverse Effect would apply. The Applicant and the SHPO/THPO should engage in further discussions and make a reasonable and good faith effort to resolve their disagreement.
4. If the SHPO/THPO and Applicant do not resolve their dispute, the Applicant may at any time choose to submit the matter, together with all relevant documents, to the Commission, advising the SHPO/THPO accordingly.
5. Whenever the Applicant or the Commission concludes, or a SHPO/THPO advises, that a proposed project will have an adverse

effect on a Historic Property, after applying the criteria of Adverse Effect, the Applicant and the SHPO/THPO are encouraged to investigate measures that would avoid the adverse effect and permit a conditional "No Adverse Effect" determination.¹⁶ The EBCI/THPO recommends that the word "encourage" be replaced with the word "will"

6. If the Applicant and SHPO/THPO mutually agree upon conditions that will result in no adverse effect, the Applicant shall advise the SHPO/THPO in writing that it will comply with the conditions. The Applicant can then make a determination of no adverse effect subject to its implementation of the conditions. The Undertaking is then deemed conditionally to have no adverse effect on Historic Properties, and the Applicant may proceed with the project subject to those conditions. Where the Commission has previously been involved in the matter, the Applicant shall notify the Commission of this resolution.¹⁷

D. Determinations of Adverse Effect

1. If the Applicant determines at any stage in the process that an Undertaking would have an adverse effect on Historic Properties within the APE(s), or if the Commission so finds, the Applicant shall submit to the SHPO/THPO a plan designed to avoid, minimize, or mitigate the adverse effect.
2. The Applicant shall forward a copy of its submission with its mitigation plan and the entire record to the Council and the Commission. Within fifteen days following receipt of the Applicant's submission, the Council shall indicate whether it intends to participate in the negotiation of a Memorandum of Agreement by notifying both the Applicant and the Commission.
3. Where the Undertaking would have an adverse effect on a National Historic Landmark, the Commission shall request the Council to participate in consultation and shall invite participation by the Secretary of the Interior.
4. The Applicant, SHPO/THPO, and consulting parties shall negotiate a Memorandum of Agreement that shall be sent to the Commission for review and execution.

¹⁶ The Council would like to change "encourage" to "shall" and USET agrees. Verizon Wireless disagrees with the Council and USET.

¹⁷ PCIA suggests permitting the Commission to make its own determinations with respect to conditional no adverse effect when the SHPO and Applicant cannot agree.

5. If the parties are unable to agree upon mitigation measures, they shall submit the matter to the Commission, which shall coordinate additional actions in accordance with the Council's rules, including 36 C.F.R. §§ 800.6(b)(1)(v) and 800.7.¹⁸ The EBCI-THPO recommends that the word parties be explained here as it has been in # 4. We also recommend that tribes be include in this process in the event that all do not have THPO's

VIII. EMERGENCY SITUATIONS

Unless the Commission deems it necessary to issue an emergency authorization in accordance with its rules, or the Undertaking is otherwise excluded from Section 106 review pursuant to Section III of this Agreement, the procedures in this Agreement shall apply.

IX. INADVERTENT OR POST-REVIEW DISCOVERIES

- A. In the event that an Applicant discovers a previously unidentified site within the APE that may be a Historic Property that would be affected by an Undertaking, the Applicant shall promptly notify the Commission, the SHPO/THPO and any potentially affected Indian tribe or NHO, and within a reasonable time shall submit to the Commission, the SHPO/THPO and any potentially affected Indian tribe or NHO, a written report evaluating the property's eligibility for inclusion in the National Register. The Applicant shall seek the input of any potentially affected Indian tribe or NHO in preparing this report. If found during construction, construction must cease until evaluation has been completed. The EBCI-THPO would like the word "promptly" to be discussed. We would also like to see in the last sentence after 'evaluation' the word "consultation" with SHPO/THPO and tribes, be implemented.
- B. If the Applicant and SHPO/THPO concur that the discovered resource is eligible for listing in the National Register, the Applicant will consult with the SHPO/THPO, and tribes as appropriate, to evaluate measures that will avoid, minimize, or mitigate adverse effects. Upon agreement regarding such measures, the Applicant shall implement them and notify the Commission of its action.
- C. If the Applicant and SHPO/THPO cannot reach agreement regarding the eligibility of a property, the matter will be referred to the Commission for review in accordance with Section VI.D.2. If the Applicant and the SHPO/THPO cannot reach agreement on answers to avoid, minimize, or

¹⁸ CTIA requests specific time estimates for completing activities in VII.D.1-5.

mitigate adverse effects, the matter shall be referred to the Commission for appropriate action.

- D. If the Applicant discovers any human or burial remains during implementation of an Undertaking, the Applicant shall cease work immediately, notify the SHPO/THPO and Commission, and adhere to applicable State and Federal laws regarding the treatment of human or burial remains. The EBCI-THPO that a need for confidentiality with all burial discoveries need to be applied here. We also recommend that a time be set here for notificaton.

X. CONSTRUCTION PRIOR TO COMPLIANCE WITH SECTION 106

- A. The terms of Section 110(k) of the National Historic Preservation Act (16 U.S.C. § 470h-2(k)) ("Section 110(k)") apply to Undertakings covered by this Agreement. Any SHPO/THPO, potentially affected Indian tribe or NHO, the Council, or a member of the public may submit a complaint to the Commission alleging that a facility has been constructed or partially constructed after the effective date of this Agreement in violation of Section 110(k). Any such complaint must be in writing and supported by substantial evidence specifically describing how Section 110(k) has been violated. Upon receipt of such complaint the Commission will assume responsibility for investigating the applicability of Section 110(k) in accordance with the provisions herein.
- B. If upon its initial review, the Commission concludes that a complaint on its face demonstrates a probable violation of Section 110(k), the Commission will immediately notify and provide the relevant Applicant with copies of the Complaint and order that all construction of a new tower or installation of any new collocations immediately cease and remain suspended pending the Commission's resolution of the complaint.
- C. Within 15 days of receipt, the Commission will review the complaint and take appropriate action, which the Commission may determine, and which may include the following:
1. Dismiss the complaint without further action if the complaint does not make out a probable violation of Section 110(k) even if the allegations are taken as true;
 2. Provide the Applicant with a copy of the complaint and request a written response within a reasonable time; the word "reasonable time" needs to be addressed. What is reasonable to one is not reasonable to another.
 3. Request a background report which documents the history and chronology of the planning and construction of the Facility;

4. Request a summary of the steps taken to comply with the requirements of Section 106 as set forth in this Nationwide Agreement, particularly the application of the Criteria of Adverse Effect;
 5. Request copies of any documents regarding the planning or construction of the Facility, including correspondence, memoranda, and agreements;
 6. If the Facility was constructed prior to complying with the requirements of Section 106, request an explanation for such failure, and possible measures that can be taken to mitigate any resulting adverse effects on Historic Properties.
- D. If the Commission concludes that there is a probable violation of Section 110(k) (*i.e.*, that "with intent to avoid the requirements of Section 106, [an Applicant] has intentionally significantly adversely affected a Historic Property")¹⁹, the Commission shall notify the Applicant and forward a copy of the documentation set forth in Stipulation X.C. to the SHPO/THPO, Council, and other consulting parties along with the Commission's opinion regarding the violation of Section 110(k). The Commission will consider the views of the consulting parties in determining a resolution, which may include negotiating a Memorandum of Agreement (MOA) that will resolve any adverse effects. The Commission, SHPO/THPO, Council, and Applicant shall sign the MOA to evidence acceptance of the mitigation plan and conclusion of the Section 106 review process. *The EBCI-THPO continues to ask that Tribes be included in this PA where SHPO/THPO's are recognized. We recommend that Tribes be included in the event that a Tribe does not have a THPO.*
- E. Nothing in Section X or any other provision of this Agreement shall preclude the Commission from continuing or instituting enforcement proceedings under the Communications Act and its rules against an Applicant that has constructed a Facility prior to completing required review under this Agreement. Sanctions for violations of the Commission's rules may include any sanctions allowed under the Communications Act and the Commission's rules.
- F. The Commission shall provide copies of all concluding reports or orders for all Section 110(k) investigations conducted by the Commission to the original complainant, the relevant local government, and other consulting parties.

¹⁹ PCIA suggests that a complete statement of Section 110(k) is preferable to a synopsis or incomplete statement.

- G. Facilities that are excluded from Section 106 review pursuant to the Collocation Agreement or Stipulation III of this Agreement are not subject to review under this provision. Any parties who allege that such Facilities have violated Section 110(k) should notify the Commission in accordance with the provisions of Stipulation XI, Public Comments and Objections. Once again the EBCL-THPO would like to know what protocol the FCC will take if this agreement is not followed. This should be addressed here.

XI. PUBLIC COMMENTS AND OBJECTIONS

Any member of the public may notify the Commission of concerns it has regarding the application of this Nationwide Agreement within a State or with regard to the review of individual Undertakings covered or excluded under the terms of this Agreement. Comments related to telecommunications activities shall be directed to the Wireless Telecommunications Bureau and those related to broadcast facilities to the Media Bureau. The Commission will consider public comments and following consultation with the SHPO/THPO, potentially affected Indian tribes and NHOs, or Council, where appropriate, take appropriate actions. The Commission shall notify the objector of the outcome of its actions.

XII. AMENDMENTS

The signatories may propose modifications or other amendments to this Agreement. Any amendment to this Agreement shall be subject to appropriate public notice and comment and shall be signed by the Commission, the Council, and the Conference.

XIII. TERMINATION

- A. Any signatory to this Agreement may request termination by written notice to the other parties. Within sixty (60) days following receipt of a written request for termination from a signatory, all other signatories shall discuss the basis for the termination request and seek agreement on amendments or other actions that would avoid termination.
- B. In the event that this Agreement is terminated, the Commission and all Applicants shall comply with the requirements of 36 C.F.R. Part 800.

XIV. ANNUAL REVIEW

The signatories to this Nationwide Agreement will meet annually on or about the anniversary of the effective date of the Agreement to discuss the effectiveness of this Agreement, including any issues related to improper implementation, and to discuss any potential amendments that would improve the effectiveness of this Agreement.

XV. RESERVATION OF RIGHTS

Neither execution of this Agreement, nor implementation of or compliance with any term herein, shall operate in any way as a waiver by any party hereto, or by any person or entity complying herewith or affected hereby, of a right to assert in any court of law any claim, argument or defense regarding the validity or interpretation of any provision of the Act or its implementing regulations contained in 36 C.F.R. Part 800.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their respective authorized officers as of the day and year first written above.

FEDERAL COMMUNICATIONS COMMISSION

Chairman

Date

ADVISORY COUNCIL ON HISTORIC PRESERVATION

Executive Director

Date

NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS

President

Date

The EBCI/THPO reommends that NATHPO (Bambi Kraus, President) sign and date this PA to secure and insure that THPO's voices are heard and recognized.

APPENDIX B

INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),¹ the Commission has prepared this present Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities of the policies and rules proposed in this *Notice of Proposed Rulemaking* ("Notice"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice* provided in paragraph 7 of the item. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.² In addition, the *Notice* and IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the *Notice*.

The *Notice* seeks comment on a draft Nationwide Programmatic Agreement ("Nationwide Agreement") among the Federal Communications Commission ("Commission"), the Advisory Council on Historic Preservation ("Council") and the National Conference of State Historic Preservation Officers ("Conference"). The Nationwide Agreement would tailor and streamline procedures for review of certain Undertakings for communications facilities under the National Historic Preservation Act of 1966 ("NHPA").⁴ In November 2001, representatives of the Commission, Council, Conference, American Indian tribes, the communications industry, and historic preservation consultants, as part of a working group sponsored by the Council, began drafting a proposed Nationwide Agreement. Consistent with the Council's rules, the draft Nationwide Agreement is intended to tailor the Section 106 review⁵ in the communications context so as to improve compliance and streamline the review process for construction of towers and other Commission Undertakings. *The EBCI-THPO will not agree on streamlining procedures that eliminates the government to government consultation required by federal agencies and tribes.*

The Commission proposes to adopt the Nationwide Agreement in order to clarify and streamline the obligations⁶ of its regulatees⁷ ("Applicants") with respect to assisting the Commission in meeting its responsibilities under the NHPA. For example, the draft Nationwide Agreement would exclude from routine Section 106 review⁸ certain Undertakings that are unlikely to affect historic properties.⁹ For those

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601- 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See 5 U.S.C. § 603(a).

³ See 5 U.S.C. § 603(a).

⁴ See 16 U.S.C. § 470 *et seq.*

⁵ Section 106 of the NHPA, codified at 16 U.S.C. § 470f, requires federal agencies to take into account the effects of certain of their undertakings on historic properties, listed or eligible for inclusion in the National Register of Historic Places, and to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to such undertakings.

⁶ See 47 C.F.R. § 1.1307(a)(4).

⁷ Commission regulatees, in this instance, include licensees, tower owners, and applicants for authorization to construct facilities in the wireless, media, and satellite services.

⁸ Commission Applicants are required to review whether a proposed tower or antenna may affect historic properties that are either listed or eligible for inclusion in the National Register, including properties that may affect sites of religious or cultural importance to Indian tribes or Native Hawaiian organizations. To do this, Applicants must

Undertakings that would remain subject to review, the draft Nationwide Agreement would specify standards and procedures that Applicants shall follow when completing the Section 106 review. For example, the Nationwide Agreement sets forth the manner in which Applicants should seek participation of Indian Tribes and Native Hawaiian Organizations; should seek tribal consultation; should seek public participation and consulting parties; should identify, evaluate, and assess effects on historic properties; and, should submit materials for review by the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) and the Commission. In addition, the draft Nationwide Agreement includes provisions for emergency situations;¹⁰ inadvertent or post-review discovery of adverse effects on historic properties; construction prior to completion of the Section 106 process; public comments; and amendment or termination of the Agreement. Finally, the Nationwide Agreement proposes to prescribe two standardized forms for making submissions to the SHPO or THPO. The EBCI-THPO would like to see the word 'should' be replaced with "will".

The Commission further proposes to amend the Note to Section 1.1307(a)(4) in order to make clear that the procedures in the Nationwide Agreement will be binding on applicants, and that non-compliance with these procedures would subject a party to potential enforcement action by the Commission. Specifically, the Note to Section 1.1307(a)(4) would be amended to specify that in order to ascertain whether a proposed action may affect properties that are listed or eligible for listing in the National Register,¹¹ an Applicant shall follow the procedures set forth in the rules of the Council, as modified and supplemented by the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 66 Fed. Reg. 17554, and this Nationwide Agreement. The EBCI-THPO recommends a stronger word used other than "potential" enforcement; is FCC commenting that they may or may not reprimand their applicant. We would recommend that what ever enforcement's are taken be placed in the P. A. for clarification.

B. Legal Basis.

We tentatively conclude that we have authority under Sections 1, 4(i), 301, 303(q), 303(r), 309(a), 309(j), and 319 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 301, 303(q), 303(r), 309(a), 309(j), and 319, Section 106 of the National Historic Preservation Act of 1966, 16 U.S.C.

begin the Section 106 process by first presenting documentation of the review to the State Historic Preservation Officer and any relevant Tribal Historic Preservation Officers.

⁹ An "Undertaking" subject to review under the NHPA is defined as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including (A) those carried out by or on behalf of the agency; (B) those carried out with Federal financial assistance; (C) those requiring a Federal permit, license, or approval; and (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." 16 U.S.C. § 470w(7). The Commission's environmental rules currently treat construction of licensed communications facilities as "Undertakings." An illustrative list of Commission activities in relation to which Undertakings covered by the draft Nationwide Agreement may occur is provided here as Attachment 2 to Appendix A ("Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission").

¹⁰ The draft Nationwide Agreement outlines the manner in which applicants should complete Section 106 reviews in those circumstances when emergency service is needed in a specific location.

¹¹ "Listed" properties are those properties for which an application for inclusion in the National Register of Historic Places ("National Register") has been approved. Under Section 800.16(l)(2) of the regulations of the Advisory Council on Historic Preservation, 36 C.F.R. § 800.16(l)(2), the term "eligible for inclusion in the National Register" includes both properties formally determined as such by the Keeper of the National Register in accordance with applicable regulations of the Secretary of the Interior and all other properties that meet the National Register criteria. Information on the characteristics of properties that meet these criteria is available at the National Register web site: www.cr.nps.gov/nr.

§ 470f, and Section 800.14(b) of the rules of the Advisory Council on Historic Preservation, 36 C.F.R. § 800.14(b), to adopt the proposals set forth in the Notice.

C. Description and Estimate of the Number of Small Entities to which the Rules Will Apply.

The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by proposed rules.¹² The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."¹³ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.¹⁴ A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).¹⁵

The draft Nationwide Agreement and *Notice* could result in rule changes that, if adopted, would impose requirements on entities that may construct facilities that may significantly affect the environment under Section 1.1307 of the Commission's rules. This includes various classes of Commission licensees as well as non-licensee tower owners. To assist the Commission in analyzing the total number of potentially affected small entities, commenters are requested to provide estimates of the number of small entities that may be affected by any rule changes resulting from the *Notice*.

Wireless Telecommunications

Cellular Licensees. The SBA has developed a small business size standard for small businesses in the category "Cellular and Other Wireless Telecommunications."¹⁶ Under that SBA category, a business is small if it has 1,500 or fewer employees.¹⁷ According to the Bureau of the Census, only twelve firms from a total of 1238 cellular and other wireless telecommunications firms operating during 1997 had 1,000 or more employees.¹⁸ Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition.

220 MHz Radio Service – Phase I Licensees. The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such

¹² 5 U.S.C. § 604(a)(3).

¹³ 5 U.S.C. § 601(6).

¹⁴ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

¹⁵ 15 U.S.C. § 632.

¹⁶ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517212.

¹⁷ *Id.*

¹⁸ U.S. Department of Commerce, U.S. Census Bureau, 1997 Economic Census, Information - Subject Series, Establishment and Firm Size, Table 5 – Employment Size of Firms Subject to Federal Income Tax at 64, NAICS code 517212 (October 2000).

licensees that are small businesses, we apply the definition under the SBA rules applicable to "Cellular and Other Wireless Telecommunication" companies. This category provides that a small business is a wireless company employing no more than 1,500 persons.¹⁹ According to the Bureau of the Census, only twelve firms from a total of 1238 cellular and other wireless telecommunications firms operating during 1997 had 1,000 or more employees.²⁰ If this general ratio continues in 2003 in the context of Phase I 220 MHz licensees, we estimate that nearly all such licensees are small businesses under the SBA's small business standard.

220 MHz Radio Service – Phase II Licensees. The Phase II 220 MHz service is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for defining "small" and "very small" businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.²¹ This small business standard indicates that a "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.²² A "very small business" is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years.²³ The SBA has approved these small size standards.²⁴ Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.²⁵ In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 683 were sold.²⁶ Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.²⁷

700 MHz Guard Band Licenses. In the *700 MHz Guard Band Order*, we adopted size standards for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.²⁸ A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.²⁹ Additionally, a "very small business" is an entity that, together with its affiliates

¹⁹ 13 C.F.R. § 121.201.

²⁰ U.S. Department of Commerce, U.S. Census Bureau, 1997 Economic Census, Information - Subject Series, Establishment and Firm Size, Table 5 – Employment Size of Firms Subject to Federal Income Tax at 64, NAICS code 517212 (October 2000).

²¹ Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, *Third Report and Order*, 12 FCC Rcd 10943, 11068-70, paras. 291-295 (1997) (*220 MHz Third Report and Order*).

²² *Id.* at para. 291.

²³ *Id.*

²⁴ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

²⁵ See generally "220 MHz Service Auction Closes," *Public Notice*, 14 FCC Rcd 605 (WTB 1998).

²⁶ "FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses after Final Payment is Made," *Public Notice*, 14 FCC Rcd 1085 (WTB 1999).

²⁷ "Phase II 220 MHz Service Spectrum Auction Closes," *Public Notice*, 14 FCC Rcd 11218 (WTB 1999).

²⁸ See Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *Second Report and Order*, 15 FCC Rcd 5299 (2000).

²⁹ *Id.* at ¶¶ 106-108.

and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.³⁰ An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000.³¹ Of the 104 licenses auctioned, 96 licenses were sold to 9 bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.³²

Lower 700 MHz Band Licenses. We adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.³³ We have defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.³⁴ A very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.³⁵ Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (MSA/RSA) licenses. The third category is entrepreneur, which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years. An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings [EAGs]) commenced on August 27, 2002, and closed on September 18, 2002.³⁶ Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses.

Upper 700 MHz Band Licenses. The Commission released a Report and Order, authorizing service in the upper 700MHz band.³⁷ No auction has been held yet.

Private and Common Carrier Paging. In the *Paging Second Report and Order*, we adopted a size standard for "small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.³⁸ A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the

³⁰ *Id.* at ¶¶ 106-108.

³¹ See generally, "220 MHz Service Auction Closes: Winning Bidders in the Auction of 908 Phase II 220 MHz Service Licenses," *Public Notice*, DA 98-2143 (rel. October 23, 1998).

³² "700 MHz Guard Bands Auction Closes: Winning Bidders Announced," *Public Notice*, 16 FCC 4590 (WTB 2001).

³³ See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), GN Docket No. 01-74, *Report and Order*, 17 FCC Rcd 1022 (2002).

³⁴ *Id.* at ¶ 172.

³⁵ *Id.* at ¶ 172.

³⁶ See "Lower 700 MHz Band Auction Closes," 17 FCC Rcd 17272 (2002).

³⁷ Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *Second Memorandum Opinion and Order*, 16 FCC Rcd 1239 (2001).

³⁸ Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Second Report and Order*, 12 FCC Rcd 2732, 2811-2812, paras. 178-181 (*Paging Second Report and Order*); see also Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 10030, paras. 98-107 (1999).

preceding three years.³⁹ The SBA has approved this definition.⁴⁰ An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000.⁴¹ Of the 985 licenses auctioned, 440 were sold. 57 companies claiming small business status won licenses. An auction of Metropolitan Economic Area (MEA) and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001.⁴² Of the 15,514 licenses auctioned, 5,323 were sold. 132 companies claiming small business status purchased 3,724 licenses. At present, there are approximately 24,000 Private Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service*, 608 carriers reported that they were engaged in the provision of either paging or "other mobile" services.⁴³ Of these, we estimate that 589 are small, under the SBA-approved small business size standard. We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

Broadband Personal Communications Service (PCS). The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.⁴⁴ For Block F, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.⁴⁵ These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.⁴⁶ No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 "small" and "very small" business bidders won approximately 40% of the 1,479 licenses for Blocks D, E, and F.⁴⁷ On March 23, 1999, the Commission reaucted 155 C, D, E, and F Block licenses; there were 113 small business winning bidders. Based on this information, we conclude that the number of small broadband PCS licensees include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks plus the 113 winning bidders in the re-auction, for a total of 296 small entity broadband PCS providers as defined by the SBA small business standards and the Commission's auction rules.

Narrowband PCS. To date, two auctions of narrowband personal communications services (PCS) licenses have been conducted. For purposes of the two auctions that have already been held,

³⁹ *Paging Second Report and Order*, 12 FCC Rcd at 2811, para. 179.

⁴⁰ See Letter to Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

⁴¹ See generally "220 MHz Service Auction Closes," *Public Notice*, 14 FCC Rcd 605 (WTB 1998).

⁴² See generally "220 MHz Service Auction Closes," *Public Notice*, 14 FCC Rcd 605 (WTB 1998).

⁴³ See *Trends in Telephone Service*, Industry Analysis Division, Wireline Competition Bureau, Table 5.3 - Number of Telecommunications Service Providers that are Small Businesses (May 2002).

⁴⁴ See Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, *Report and Order*, 11 FCC Rcd 7824, paras. 57-60 (1996); see also 47 C.F.R. § 24.720(b).

⁴⁵ See Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, para. 60 (1996).

⁴⁶ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from A. Alvarez, Small Business Administration, dated December 2, 1998.

⁴⁷ FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (rel. January 14, 1997).

"small businesses" were entities with average gross revenues for the prior three calendar years of \$40 million or less.⁴⁸ Through these auctions, the Commission has awarded a total of 41 licenses, out of which 11 were obtained by small businesses. To ensure meaningful participation of small business entities in future auctions, the Commission has adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*. A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million.⁴⁹ A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.⁵⁰ The SBA has approved these small business size standards.⁵¹ There is also one megahertz of narrowband PCS spectrum that has been held in reserve and that the Commission has not yet decided to release for licensing. The Commission cannot predict accurately the number of licenses that will be awarded to small entities in future actions. However, four of the 16 winning bidders in the two previous narrowband PCS auctions were small businesses, as that term was defined under the Commission's Rules. The Commission assumes, for purposes of this analysis that a large portion of the remaining narrowband PCS licenses will be awarded to small entities. The Commission also assumes that at least some small businesses will acquire narrowband PCS licenses by means of the Commission's partitioning and disaggregation rules.

800 and 900 MHz Specialized Mobile Radio (SMR). Pursuant to 47 C.F.R. § 90.814(b) (1), the Commission has established a small business size standard for purposes of auctioning SMR licenses in the 900 MHz band, the upper 200 channels of the 800 MHz band, and the lower 230 channels of the 800 MHz band as a firm that has had average annual gross revenues of \$15 million or less in the three preceding calendar years.⁵² The SBA has approved this small business size standard for the 800 MHz and 900 MHz auctions.⁵³ Sixty winning bidders for geographic area licenses in the 900 MHz SMR band qualified as small businesses under the \$15 million size standard. The auction of the 525 800 MHz SMR geographic area licenses for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten (10) winning bidders for geographic area licenses for the upper 200 channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard.

The auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven (11) winning bidders for geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed "small business" status. Thus, 40 winning bidders for geographic licenses in the 800 MHz SMR band qualified as small business. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation

⁴⁸ In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 15 FCC Rcd 10456, 10476, ¶ 40 (May 18, 2000).

⁴⁹ *Id.* at 15 FCC Rcd 10476, ¶ 40.

⁵⁰ *Id.* at 15 FCC Rcd 10476, ¶ 40.

⁵¹ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from A. Alvarez, Administrator, Small Business Administration (Dec. 2, 1998).

⁵² 47 C.F.R. § 90.814(b)(1).

⁵³ See Letter to Tom Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999.

authorizations on the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is established by SBA.

Private Land Mobile Radio (PLMR). PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories. The SBA has not developed a definition of small entity specifically applicable to PLMR licensees due to the vast array of PLMR users. For purposes of this IRFA, we will use the SBA's definition applicable to radiotelephone (wireless) companies -- that is, an entity with no more than 1,500 persons.⁵⁴

The Commission is unable at this time to estimate the number of small businesses which could be impacted by the rules. The Commission's 1994 Annual Report on PLMRs⁵⁵ indicates that at the end of fiscal year 1994 there were 1,087,267 licensees operating 12,481,989 transmitters in the PLMR bands below 512 MHz. Because any entity engaged in a commercial activity is eligible to hold a PLMR license, the revised rules in this context could potentially impact every small business in the United States.

Fixed Microwave Services. Microwave services include common carrier,⁵⁶ private-operational fixed,⁵⁷ and broadcast auxiliary radio services.⁵⁸ At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. For purposes of this IRFA, we will use the SBA's definition applicable to radiotelephone (wireless) companies -- that is, an entity with no more than 1,500 persons.⁵⁹ We estimate that all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition for radiotelephone (wireless) companies.

Public Safety Radio Services. Public Safety radio services include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services.⁶⁰ There are a

⁵⁴ 13 C.F.R. § 121.201.

⁵⁵ Federal Communications Commission, 60th Annual Report, Fiscal Year 1994, at paragraph 116.

⁵⁶ 47 C.F.R. §§ 101 *et seq.* (formerly, part 21 of the Commission's Rules).

⁵⁷ Persons eligible under parts 80 and 90 of the Commission's rules can use Private Operational-Fixed Microwave services. See 47 C.F.R. parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

⁵⁸ Auxiliary Microwave Service is governed by part 74 of Title 47 of the Commission's Rules. See 47 C.F.R. Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

⁵⁹ 13 C.F.R. § 121.201.

⁶⁰ With the exception of the special emergency service, these services are governed by Subpart B of part 90 of the Commission's Rules, 47 C.F.R. §§ 90.15 through 90.27. The police service includes approximately 27,000 licensees that serve state, county, and municipal enforcement through telephony (voice), telegraphy (code) and teletype and facsimile (printed material). The fire radio service includes approximately 23,000 licensees comprised of private volunteer or professional fire companies as well as units under governmental control. The local government service that is presently comprised of approximately 41,000 licensees that are state, county, or municipal entities that use the

total of approximately 127,540 licensees within these services. Governmental entities⁶¹ as well as private businesses comprise the licensees for these services. All governmental entities with populations of less than 50,000 fall within the definition of a small entity.⁶²

Offshore Radiotelephone Service. This service operates on several UHF TV broadcast channels that are not used for TV broadcasting in the coastal areas of states bordering the Gulf of Mexico.⁶³ There are presently approximately 55 licensees in this service. We are unable to estimate at this time the number of licensees that would qualify as small under the SBA's definition for radiotelephone (wireless) communications.

Wireless Communications Services. This service can be used for fixed, mobile, radiolocation and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of \$15 million for each of the three preceding years. The SBA has approved these definitions.⁶⁴ The FCC auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as very small business entities, and one that qualified as a small business entity. We conclude that the number of geographic area WCS licensees affected includes these eight entities.

39 GHz Service. The Commission defined "small entity" for 39 GHz licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.⁶⁵ An additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.⁶⁶ These regulations defining "small entity" in the context of 39 GHz auctions have been approved by the SBA. The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by the rules and policies adopted herein.

radio for official purposes not covered by other public safety services. There are approximately 7,000 licensees within the forestry service which is comprised of licensees from state departments of conservation and private forest organizations who set up communications networks among fire lookout towers and ground crews. The approximately 9,000 state and local governments are licensed to highway maintenance service provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. The approximately 1,000 licensees in the Emergency Medical Radio Service (EMRS) use the 39 channels allocated to this service for emergency medical service communications related to the delivery of emergency medical treatment. 47 C.F.R. §§ 90.15 through 90.27. The approximately 20,000 licensees in the special emergency service include medical services, rescue organizations, veterinarians, handicapped persons, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities, and emergency repair of public communications facilities. 47 C.F.R. §§ 90.33 through 90.55.

⁶¹ 47 C.F.R. § 1.1162.

⁶² 5 U.S.C. § 601(5).

⁶³ This service is governed by subpart I of part 22 of the Commission's Rules. See 47 C.F.R. § 22.1001 through § 22.1037.

⁶⁴ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division from A. Alvarez, Administrator, SBA (December 2, 1998).

⁶⁵ See In the Matter of Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Band, *Report and Order*, 12 FCC Rcd 18600 (1997).

⁶⁶ *Id.*

Multipoint Distribution Service. MDS involves a variety of transmitters, which are used to relay programming to the home or office.⁶⁷ Hundreds of stations were licensed prior to implementation of Section 309(j) of the Communications Act of 1934, as amended.⁶⁸ For these pre-auction licenses, the applicable standard is SBA's small business size standard for "other telecommunications" (annual receipts of \$11 million or less).⁶⁹ We are unable to estimate the number of pre-auction MDS licensees that are small businesses. The Commission has defined "small entity" for purposes of the 1996 auction of MDS as an entity that, together with its affiliates, has average gross annual revenues that are not more than \$40 million for the preceding three calendar years.⁷⁰ This definition of a small entity in the context of MDS auctions has been approved by the SBA.⁷¹ The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 BTAs. Of the 67 auction winners, 61 met the definition of a small business, but only 42 remain small businesses.

Local Multipoint Distribution Service. The auction of the 1,030 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998, and closed on March 25, 1998. The Commission defined "small entity" for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.⁷² An additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.⁷³ These regulations defining "small entity" in the context of LMDS auctions have been approved by the SBA.⁷⁴ There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 40 small business winning bidders. Based on this information, we conclude that the number of small LMDS licenses includes the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

218-219 MHz Service. The first auction of 218-219 MHz spectrum resulted in 178 entities winning licenses for 594 Metropolitan Statistical Areas (MSAs). Of the 594 licenses, 557 were won by 178 entities qualifying as a small business. For that auction, we defined a small business as an entity that, together with its affiliates, has no more than a \$6 million net worth and, after federal income taxes

⁶⁷ For purposes of this item, MDS includes the single channel Multipoint Distribution Service (MDS) and the Multichannel Multipoint Distribution Service (MMDS). For the number of incumbents and auction winners who qualify, see In the Matter of Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Notice of Proposed Rule Making and Memorandum Opinion and Order*, FCC 03-56 (rel. April 2, 2003) ("MDS/ITFS NPRM and MO&O").

⁶⁸ 47 U.S.C. § 309(j).

⁶⁹ See 13 C.F.R. § 121.201

⁷⁰ 47 C.F.R. § 1.2110(a)(1).

⁷¹ See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding, MM Docket No. 94-131 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589 (1995).

⁷² See Local Multipoint Distribution Service, Second Report and Order, 62 Fed. Reg. 23148 (April 29, 1997).

⁷³ *Id.*

⁷⁴ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau (FCC) from A. Alvarez, Administrator, SBA (January 6, 1998).

(excluding any carry over losses), has no more than \$2 million in annual profits each year for the previous two years.⁷⁵ In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, we defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not to exceed \$15 million for the preceding three years.⁷⁶ A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not to exceed \$3 million for the preceding three years.⁷⁷ We cannot estimate, however, the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218-219 MHz spectrum. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this IRFA that in future auctions, all of the licenses may be awarded to small businesses by these revised rules.

24 GHz Service. The rules that we adopt could affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The Commission did not develop a definition of small entities applicable to existing licensees in the 24 GHz band. We believe that there are only two licensees in the 24 GHz band.

Location and Monitoring Service (LMS). Multilateration LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed \$15 million.⁷⁸ A "very small business" is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed \$3 million.⁷⁹ These definitions have been approved by the SBA.⁸⁰ An auction for LMS licenses commenced on February 23, 1999 and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses. We conclude that the number of LMS licensees affected by this *Notice* includes these four entities. We cannot accurately predict the number of remaining licenses that could be awarded to small entities in future LMS auctions.

Media Services (Broadcast & Cable)

Commercial Television Services. The SBA defines a television broadcasting station that has no more than \$12.0 million in annual receipts as a small business.⁸¹ Television broadcasting stations consist

⁷⁵ Implementation of Section 309(j) of the Communications Act--Competitive Bidding, PP WT Docket No. 93-253, Fourth Report and Order, 59 Fed. Reg. 24947 (May 13, 1994).

⁷⁶ In the Matter of Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, WT Docket No. 98-169, *Report and Order and Memorandum Opinion and Order*, 64 Fed. Reg. 59656 (November 3, 1999).

⁷⁷ Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, 64 Fed. Reg. 59656 (1999).

⁷⁸ Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Second Report and Order*, 13 FCC Rcd 15182 ¶ 20 (1998); see also 47 C.F.R. § 90.1103.

⁷⁹ *Id.*

⁸⁰ See Letter to Letter to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration (Feb. 22, 1999).

⁸¹ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 515120.

of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.⁸² Included in this industry are commercial, religious, educational, and other television stations.⁸³ Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials.⁸⁴

There were 1,695 full-service television stations operating in the United States as of December 2001.⁸⁵ According to Census Bureau data for 1997, there were 906 Television Broadcasting firms, total, that operated for the entire year.⁸⁶ Of this total, 734 firms had annual receipts of \$9,999,999.00 or less and an additional 71 had receipts of \$10 million to \$24,999,999.00.⁸⁷ Thus, under this standard, the majority of firms can be considered small.

Commercial Radio Services.

The SBA defines a radio broadcasting station that has no more than \$6 million in annual receipts as a small business.⁸⁸ A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.⁸⁹ Included in this industry are commercial, religious, educational, and other radio stations.⁹⁰ Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.⁹¹ According to Census Bureau data for 1997, there were 4,476 Radio Stations (firms), total, that operated for the entire year.⁹² Of this total 4,265 had annual receipts of \$4,999,999.00 or less, and an additional 103 firms had receipts of \$5 million to \$9,999,999.00.⁹³ Thus, under this standard, the great majority of firms can be considered small.

Cable Systems. The Commission has developed, with SBA's approval, its own definition of small cable system operators. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.⁹⁴ Based on our most recent information, we estimate that

⁸² Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

⁸³ *Id.*; see Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual*, at 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 515120.

⁸⁴ 1992 Census, Series UC92-S-1, at Appendix A-9.

⁸⁵ FCC News Release, Broadcast Station Totals as of December 31, 2001 (released May 21, 2002).

⁸⁶ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 515120.

⁸⁷ *Id.* The census data do not provide a more precise estimate.

⁸⁸ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 515112.

⁸⁹ 1992 Census, Series UC92-S-1, at Appendix A-9.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 515112.

⁹³ *Id.* The census data do not provide a more precise estimate.

⁹⁴ 47 C.F.R. § 67.901(3). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of \$100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 6393 (1995). 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 515210.